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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 762

SYLVESTER JOHNSON, and STANLEY CASSIDY,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

The New Jersey trial court opinion [T.R. 78-82][1] and judgment [T.R. 16-17] are not reported. The Opinion of the Supreme Court of New Jersey [T.R. 345-364] is reported at 43 N.J. 572, 206 A.2d 737.

The long history of this case is detailed in the Petition for Post-Conviction Relief and specific reference is made to all other reported opinions. [T.R. 6-9]

[1] Citations to the portions of the joint appendix supplied to this Court and printed in the Transcript of Record will be prefixed "T.R."

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on January 19, 1965, and a timely petition for rehearing denied February 23, 1965. [T.R. 386-387] The Petition for Writ of Certiorari was filed on May 21, 1965, and was granted on November 22, 1965. [T.R. 388] The jurisdiction of this Court rests on 28 U.S.C. § 1257 (3).

Questions Presented

1. In light of the circumstances of petitioners' interrogation by the police, were their incriminating statements constitutionally inadmissible as evidence against them under the principles of *Escobedo* v. *Illinois*?

2. Where the prosecutor has commented and the trial court has charged the jury on the failure of the defendants to testify, have the petitioners been deprived of their constitutional rights against self-incrimination, such that their convictions should be reversed even though they were tried prior to *Malloy* v. *Hogan* and *Griffin* v. *California*, and even though the only contested issue was the choice between imposition of sentence or the death penalty?

3. Where the confession of one defendant, later held to have been obtained in violation of the constitutional rights of that defendant, led to the confessions of both petitioners, is the admission of their confessions an unconstitutional deprivation of their rights?

4. Where motions for severance are denied, and three defendants are tried jointly, and the confessions of each,

expressly implicating the others, are admitted into evidence over objection, and where two of the confessions given by one of the defendants are held to be coerced, does justice require that the other defendants be granted a new trial free from the prejudicial effect of the coerced confessions?

5. Where the prosecutor's inflammatory summation grievously misstated and distorted the facts, were defendants so seriously prejudiced that they were deprived of the fair trial guaranteed by due process of law?

6. Where the prosecutor, acting to induce the jury to sentence petitioners to death, argued extensively that petitioners should be executed in order to deter others from engaging in crime, an unfounded theory not based on evidence, were petitioners deprived of their lives without due process of law?

7. Where statements have been elicited from a suspect in a state criminal proceeding during a substantial period of unconstitutional police detention, such that the statements are the product of the unlawful detention, does their introduction at a later trial of that suspect deprive him of his constitutional rights?

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The New Jersey statutory provisions and rules involved provide:

> "If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment on his failure to testify, and the trier of fact may draw an inference that accused cannot truthfully deny those facts." *New Jersey Statute 2A:84A-17, Rule 23 (4).*

> "Proceedings before a magistrate: (a) Appearance: An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereon. A preliminary hearing before the magistrate shall be held forthwith." *New Jersey Revised Rules, 3:2-3(a).*

STATEMENT OF THE CASE

The Homicide

Two of three Negro defendants, convicted of murder in the first degree, presently awaiting execution, are seeking reversal of the refusal of the New Jersey courts to grant post-conviction relief.

On the evening of January 24, 1958, Edward Davis, the operator of a toy store in Camden, New Jersey, was shot and killed. As a result of information obtained from witnesses who had noticed a car leaving the scene, Wayne Godfrey was arrested in Camden on Tuesday, January 28, 1958 at approximately 1:00 P.M. At approximately 4:00 A.M. the following morning, Petitioner Stanley Cassidy was arrested at his home at 312 Pine Street, Camden, New Jersey. At 5:00 P.M. that evening, Wednesday, January 29, 1958 Petitioner Sylvester Johnson was arrested in Newark, New Jersey.

During the two days following their arrests, after continuous interrogations, each of the three defendants gave statements implicating themselves and each other in the shooting. In their statements, Petitioners admitted perpetrating the killing during the course of an armed robbery. However, in the post-trial proceedings, Petitioners, although admitting their participation in the shooting, denied that it was in the course of a robbery but claimed that they were trying to collect a debt owed by the storekeeper to Johnson. They gave a total of six formal statements, all of which were used against them at their joint trial.

Legal Proceedings

All three defendants were indicted for murder and their motions for severance refused. Their joint jury trial lasted from January 12, 1959 to January 24, 1959.

During the trial, before these implicating statements were introduced into evidence, the trial court held an *in camera* hearing to determine whether the statements were voluntary. At this hearing the police officers who made the arrests and elicited the statements, along with the stenographer who transcribed them, testified. [T.R. 85-206] Their testimony was addressed solely to the circumstances immediately surrounding the recording of the statements in the office of Chief of County Detectives Wilfred Dube. There was no testimony elicited from them concerning the events between the respective arrests and the obtaining of the formal statements, nor any testimony concerning the mental and intellectual equipment or social background of the defendants. The defendants themselves did not testify and offered no evidence concerning the taking of the statements. The trial court concluded that the statements were obtained voluntarily. They were thereafter offered to the jury without any further evidence by prosecution or defense on the question of their voluntariness or truthfulness, although the use of the statements was objected to by defendants, and there were objections to specific portions as incriminating to the other defendants but not made in the presence of the defendants, which objections were denied. In its charge to

the jury, the trial court did not instruct the jury of any need to pass upon the voluntariness of the statements. [T.R. 322-336] None of the defendants took the stand at this trial, and no evidence was offered on their behalf. All three defendants were found guilty of murder in the first degree without any recommendation of leniency, and all three were sentenced to death.

Their convictions were appealed to the Supreme Court of New Jersey. On that appeal, an issue was raised as to the validity of the trial court's procedure in determining voluntariness of the statements; however, no objection was raised nor evidence offered that the statements were untrue or involuntary. The appeal also questioned the trial court's failure to sever. The convictions were affirmed. 31 N.J. 489, 158 A.2d 11 (1960).

The issue of coercion was raised for the first time in a motion for new trial filed by new counsel which alleged, *inter alia,* that the confessions had not been fully true, that falsehoods had been "fed" to the defendants, who had been forced to make the statements and to incorporate those untruths as a result of threats, force and psychological pressures, which they were unable to resist because of lack of sleep and the effect of narcotics which they had been taking prior to their arrest and interrogation. Testimony was taken by the trial court, including the testimony of all three defendants as to the circumstances under which the statements had been obtained.[2] The trial court denied relief, 63 N.J. Super. 16, 163 A.2d 593 (1960), and the Supreme Court of New Jersey affirmed. 34 N.J. 212, 168 A.2d 1

[2] Relevant portions of the testimony of Petitioners Johnson and Cassidy have been printed in the Joint Appendix printed as part of the Transcript of Record in this Court. [T.R. 207-233]

(1961). This Court refused certiorari. 368 U.S. 933, 7 L.ed.2d 195 (1961).[a]

Defendants then filed a habeas corpus action in the United States District Court for New Jersey, raising, *inter alia*, the issue of whether the confessions had been voluntarily obtained. Judge Lane heard argument, but heard no testimony and then denied relief (although concluding that on another issue defendants had failed to exhaust their State remedies). After relief on the other ground was sought in and denied by the state courts, 38 N.J. 319, 184 A.2d 641 (1962), Judge Lane denied relief on this other ground and both his orders were appealed to the Court of Appeals for the Third Circuit. The Court of Appeals concluded that the statements of Godfrey had been illegally coerced, and granted the habeas corpus as to him, denying relief as to the other two defendants. 327 F.2d 311 (3d Cir. 1964). Judge Ganey dissented as to denial of relief for Cassidy. *Id.*, at 319. Relief on the alternate ground was also denied. 327 F.2d 320 (3d Cir. 1964). This Court denied certiorari on petitions filed by the State of New Jersey, 377 U.S. 977, 12 L.ed.2d 745 (1964), as well as by Johnson and Cassidy. 377 U.S. 984, 12 L.ed.2d 751 (1964). Mr. Justice Douglas was of the opinion that certiorari should have been granted.

Petitioners Cassidy and Johnson then instituted the present post-conviction relief proceeding. [T.R. 1-12] Relief

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[a] This Court also dismissed for want of a substantial federal question their appeal which raised the question of the validity of the New Jersey death penalty statute. 368 U.S. 145, 7 L.ed.2d 188 (1961). Attempts by Petitioners to obtain relief on other grounds were refused by the state courts: 71 N.J. Super. 506, 177 A.2d 312 (1962), affirmed, 37 N.J. 19, 179 A.2d 1 (1962); this Court again denied certiorari: 370 U.S. 928, 8 L.ed.2d 508 (1962).

was denied by the lower court after argument but without hearing testimony. [T.R. 13-82] On appeal to the Supreme Court of New Jersey, affidavits of both petitioners, along with others, supporting the factual allegations in the application for relief, were attached to the application [T.R. 365-385] and were considered by the Supreme Court of New Jersey as if offered for the trial court's consideration. [T.R. 346] The Supreme Court affirmed the denial of relief. 43 N.J. 572, 206 A.2d 732 (1964). [T.R. 345-364] This petition followed.

The testimony offered by all three defendants on their motion for new trial was uncontradicted, and the affidavits relating to the circumstances leading to their arrests and interrogations, filed in the habeas corpus proceeding and in the post-conviction relief proceeding, were not denied by the State of New Jersey, nor was any contradictory evidence offered by the State.

From their testimony and affidavits,[4] the following facts can be found relating to these incriminating statements.

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[4] As already noted in footnotes 1 and 2 *supra*, the portions of the testimony of the police officers given at the original trial which relate to the arrest and interrogation of these Petitioners, and the relevant portions of the testimony of these Petitioners themselves at the hearing on their motion for new trial, have been printed in the Transcript of Record herein, along with all of the relevant papers and affidavits filed in the lower court and the New Jersey Supreme Court in the post-conviction relief proceeding. The entire record of the trial was printed as a Joint Appendix consisting of three volumes covering 732 pages. Copies of this Joint Appendix were filed with this Court as Appendix C of the Petition for Certiorari filed in October Term, 1960, No. 1133 Misc. Where necessary to refer to material contained in these volumes, the citations herein will be preceded with the prefix "NJ/JA". Portions relevant to the habeas corpus proceeding, along with relevant portions of the testimony taken in support of the motion for new trial, were printed as part of the Joint Appendix consisting of

Statements of Stanley Cassidy

Cassidy was the second of the three defendants to be arrested. On Tuesday, January 28, 1958, at approximately 1:00 P.M., almost four days after Edward Davis had been killed, Wayne Godfrey had been arrested at the Little Click Cafe in Camden, in the company of Noah Hamilton. [T.R. 85-89] At approximately 4:00 A.M. the following morning Cassidy was taken into custody at his home in Camden by the seven officers of the Camden city and police forces: Captain of County Detectives Philip Large, County Detective William Large, City Detective Sgt. Vincent Conly (promoted to Lt. of Detectives by the time of trial), and City Detectives Golden Sunket, William O'Brien, Harry Tracy, and Nathaniel Jones. Of this group only Detectives Tracy and Jones testified at the trial concerning the details of the arrest. [T.R. 90-92] There was no testimony indicating that a warrant had been obtained for Cassidy's arrest.

According to the testimony at the trial, Cassidy was immediately taken to the Detective Bureau in the Camden City Hall. [T.R. 90] Detective Jones testified that on arrival at City Hall, Cassidy was turned over to members of the prosecutor's staff. [T.R. 92] During the next twenty hours, Cassidy made three formal statements to Detective Chief Dube, all of which were admitted into evidence at

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two volumes and containing 419 pages which were filed in the U.S. Court of Appeals for the Third Circuit, copies of which were also filed in this Court with the two Petitions for Certiorari numbered October Term, 1963, Nos. 1018 and 1322 Misc. Where necessary to refer to the testimony therein, the citations will be preceded with the prefix "CA/JA".

the trial. [NJ/JA 458a, 484a, 491a et seq.] Five hours elapsed between Cassidy's arrest and the beginning of his first formal statement. During that period he was questioned by several detectives. The intensity of the interrogation appears in Cassidy's testimony at the hearing on the motion for new trial. He was questioned continuously from the time he was arrested until he was taken to Detective Chief Dube's office at 9:00 A.M. [T.R. 227-229] He also testified at that hearing that he was physically abused. [T.R. 228] In his affidavit which is part of this record, unanswered and uncontradicted by any of the State's evidence, Petitioner Cassidy goes into greater detail about the physical and psychological pressures, the threats, implied threats and tricks to which he was subjected, and the failure of anyone to advise him of his rights. [T.R. 365-368]

At the new trial hearing, Cassidy testified that he was a heavy user of narcotics, that he was suffering effects of narcotics intoxication at the time of arrest. [CA/JA 355a-356a] Cassidy was 25 years old at the time of the trial. He had an 8th grade education and was chronically unemployed. He had never before been arrested or even questioned by the police. A psychologist at the State's Diagnostic Center at Menlo Park described Cassidy as "an extremely inadequate regressed and passive individual."[5] [CA/JA 33a] A psychiatric report from the same Center described him as a "highly conflicted, immature individual" with "deep feelings of incompetence." [CA/JA 29a-30a] He is also characterized as an "inadequate personality who

[5] These reports were attached to exhibits to the petition for writ of habeas corpus in the U.S. District Court and were printed in the two volume Joint Appendix filed in the Court of Appeals and also in this Court in that proceeding.

needed narcotics to alleviate his present anxieties. [CA/JA 34a] According to one psychological report, "of the three men, Cassidy is certainly the most passive, the most inadequate and at the present time the most repentent." [CA/JA 34a]

Nothing in the testimony of the officers disputes any of Cassidy's contentions. On the testimony of Chief Dube himself, it is clear that Cassidy was not warned of his constitutional rights. According to Chief Dube, after he introduced himself and the others present in the room to Cassidy, stated that Davis had been killed during a "hold up", and then stated "I am going to ask you some questions as to what you know about the hold up, but before I ask you these questions, it is my duty to warn you that everything you tell me must be of your own free will, must be the truth, without any promises or threats having been made to you, and knowing anything you tell me can be used against you, or any other person, at some further time." [NJ/JA 459a; T.R. 114] This warning did not advise him of his right to remain silent, of his constitutional right to counsel and to consult with counsel before making any statement, nor of his right to communicate with relatives or friends. It also did not advise him of his absolute right under New Jersey law to be taken before a magistrate without unnecessary delay.

In the first of the statements, Cassidy confessed that he, Godfrey and Johnson had gone to Davis' store to rob, but did not admit to a planned armed robbery. Two hours after the first statement, Cassidy was taken to Chief Dube's office again, and at 12:15 P.M. made a second statement in which he admitted, in contradiction of his first

statement, that he had carried a pistol when they went to the store. [T.R. 130 et seq.] At the new trial hearing, Cassidy testified that he had been tricked into telling the prosecutor that he had a gun at home by the statement that they simply wanted to see if it had been fired and by the promise that they would not use it in evidence against him if it had not been fired. [T.R. 232-233] In his affidavit he adds that he was promised by the prosecutor that after giving the statement he could contact his parents —a promise that was not kept. [T.R. 367]

His third statement was taken in Chief Dube's office at 11:40 P.M. that evening. [T.R. 135 et seq.] In this statement Cassidy, having been shown the weapon used to kill Davis, admitted that he had held the gun overnight for Johnson and returned it to him prior to the shooting. In his affidavit, Cassidy alleges that he again asked Chief Dube if he could telephone his mother, and was told that he could only if he completed the statement. [T.R. 367]

Cassidy also alleges in his affidavit that prior to the second and third statements he was allowed to talk to Godfrey who told him that he might as well confess because Godfrey had done so. [T.R. 367] Godfrey's confession was ruled invalid by the Court of Appeals.

Cassidy was not taken before a judicial officer until Friday, January 31, 1958, three days after his arrest. According to Cassidy's affidavit, when the judge learned that the police had not allowed him to contact his family so that they could obtain a lawyer, the judge told the prosecutor to let the defendants speak to their families. [T.R. 367-368]

Statement of Sylvester Johnson

Sylvester Johnson was the last of the three defendants to be arrested. He was apprehended in Newark, New Jersey, at the home of an uncle at 5:00 P.M. on January 29, 1958. [T.R. 93] The arresting officers, who went from Camden to get Johnson, including City Detective Sgt. Vincent Conly, City Detectives Harry Tracy, Nathaniel Jones, and William O'Brien, Camden County Detective Harry Gabor, and a detective identified in the record only by his last name, Dunn. [T.R. 93] There was a Newark detective in charge named Clayton B. Norris. [T.R. 380] Wayne Godfrey, who had already given the first of his statements held by the Court of Appeals to have been coerced, personally brought the police to this location. Of the entire group of arresting officers only Sgt. Conly and Detective O'Brien testified at the trial. [T.R. 93 et seq., 101 et seq.] The arrest occurred in the late afternoon on the date on which the two of the incriminating statements of Cassidy and the first of Godfrey, had already been recorded.

The arresting officers took Johnson to the Newark Detective Bureau where he was photographed, fingerprinted and questioned. [T.R. 93 et seq., 101 et seq.] Approximately five hours later he was taken before a municipal judge or magistrate in the same municipal building. [T.R. 93-95] Neither at the time of his arrest nor subsequently was he advised by anyone that he had the right to obtain counsel or to talk to an attorney or his family. No one advised him that he could remain silent. When taken to the court, he requested to see an attorney and to contact his family. Detectives Conly and Norris told him that he could see an attorney and talk to his family after he gave a confession. [T.R. 380]

What transpired at the arraignment does not appear in the record. Sgt. Conly testified that the Judge advised Johnson of his rights. [T.R. 95] Johnson's affidavit states that he believes Conly signed some papers and the judge asked the officers some questions. He was not advised of his right to see counsel, of his right to see his family, nor of his right to remain silent. He was not asked anything by the court or by anyone else, and was taken out after approximately ten minutes. [T.R. 380-381]

He was then taken back to the interrogation room and was questioned intermittently until approximately 1:30 A.M., Thursday, January 30, 1958 when he was returned to his cell. During the interrogation he again requested permission to speak to his uncle to arrange for a lawyer. Conly told him that he could not see or speak to anyone until he had given a confession. [T.R. 381]

Approximately 2:00 A.M. on January 30, 1958 three County detectives took him by automobile to Camden. [T.R. 95, 102] Detective William O'Brien drove, with Johnson sitting in the rear between Sgt. Conly and Detective Tracy. [T.R. 102] During the ride to Camden, he was questioned persistently and constantly. He denied knowledge of a murder or hold up, and asked to speak to his family so he could get a lawyer on arrival in Camden. [T.R. 381] Conly told him that he could not see anyone until after he told them what he wanted, and got angry during the ride because of his refusal to "cooperate" and punched him in his mouth. [T.R. 381] Conly admitted that on the ride from Newark to Camden Johnson was told that Cassidy and Godfrey had been picked up and named him as the trigger man. [T.R. 199-200]

On arrival in the Camden City Hall police station about 4:00 A.M., January 30, his interrogation was continued until 4:45 A.M. when he was taken into Chief Dube's office. There he was told that Godfrey and Cassidy had confessed and both Cassidy and Godfrey were brought in separately and identified him as the person who had actually done the shooting. Again, he asked if he could contact his mother to get a lawyer and again he was told he could see no one until he gave a statement. [T.R. 380-381] Finally, he gave a formal statement to Chief Dube which was later introduced at the trial.

Johnson testified that he was under the influence of narcotics at the time of the shooting and remembered nothing about it; he testified that the information contained in his statement was "fed" to him from the time he was interrogated in Newark until he gave the statement to Chief Dube. [T.R. 209] He also testified to physical mistreatment. [T.R. 226]

Johnson's background, character and mental equipment to endure physical and psychological pressures were disclosed from the State's own psychiatric reports. He was the youngest of the three suspects, being only 21 years of age at the time of the incident, and had only a 7th grade education. A State psychiatrist from the Menlo Park Diagnostic Center found that he exhibited "intense feelings of insecurity and inadequacy which were conspicuous throughout his entire life." [CA/JA 190a] A State psychologist characterized him as "an insecure, grossly inadequate, poorly integrated schizoid personality whose stability and judgment goes to pieces under douress [sic] and stress." [CA/JA 27a] The record shows in the transcribed statement that followed, Chief Dube began with

the same introduction that had been used with Cassidy, as well as Godfrey. [NJ/JA 555a] This contained no warning or explanation of his constitutional rights.

SUMMARY OF ARGUMENT

The circumstances of the interrogation of both of these petitioners by police, were such as to require the application of the doctrine of *Escobedo* v. *Illinois*. One of the petitioners, a Negro of limited education, with no prior experience in questioning by the police, and with limited psychological resources, was arrested by seven officers in the middle of the night, without a warrant, was subjected to continuous questioning as well as physical and mental pressures, was not advised of his right to see his family or consult with counsel, and was told that he had been implicated by another defendant, whose confessions were later held to have been unconstitutionally coerced. Although he was at all times in the same public building which contained the county courts, he was not taken before a judicial officer until three days after his arrest, long after the police had wrested from him three formal incriminating statements. The other petitioner, described by a state psychologist as an insecure, grossly inadequate and poorly integrated schizoid personality, was under the influence of narcotics when arrested and was then questioned continuously through the early hours of the morning, was confronted with several confessions of both other defendants, including one later held to have been coerced. He was subjected to physical abuse and mental pressures, was refused permission to consult an attorney or to see his family, and was not advised of his right to remain silent. Under these circumstances, the statements should be ex-

cluded, even though petitioners were tried prior to the decision of this Court in *Escobedo* v. *Illinois.*

The trial also took place prior to the decisions of this Court in *Malloy* v. *Hogan* and *Griffin* v. *California.* The prosecutor, in his closing speeches, suggested that unfavorable inferences be drawn by the jury from the failure of the defendants to take the stand and to state that they were sorry; the trial judge also instructed the jury of its right to draw unfavorable inferences. Although this type of comment and charge were authorized by the New Jersey statute in effect at the time of the trial, the petitioners were deprived of their constitutional privilege against self-incrimination, and the type of "evidence" created by the argument and charge affected the integrity of the fact finding process sufficiently to justify applying the principles of the *Malloy* and *Griffin* decisions. This is no less true even though the main issue contested was the penalty to be imposed by the jury—life imprisonment or the death penalty.

During the course of the trial there was introduced into evidence several statements obtained from petitioners as a direct result of their being confronted with the unconstitutionally coerced statement of a co-defendant. These products of official illegality should be excluded from this trial. At any rate, the coerced confessions of the co-defendant implicated these petitioners; yet they were admitted into evidence without deletion of the implicating references. Despite the cautionary instructions of the trial judge, these petitioners were irreparably harmed. It was the duty of the trial judge—or of the appellate courts—to grant them a new trial free from this prejudicial evidence.

In his summation the prosecutor so misstated and distorted the facts and made such inflammatory statements as to deprive petitioners of their right to a fair trial. In addition, the prosecutor argued extensively for the imposition of the death penalty in order to deter others from crime—an unfounded theory not based on evidence. This effectively deprived petitioners of their right to a fair determination of the penalty to be imposed.

Finally, the statements of one of the petitioners was obtained during the course, and as a product of, his unlawful detention, after his arrest without a warrant and without being granted a prompt arraignment as required by state law. The admission of such statements in evidence against him deprived him of his constitutional rights.

ARGUMENT

I.

In Light of the Circumstances of Petitioners' Interrogation by the Police, Their Incriminating Statements Were Constitutionally Inadmissible as Evidence Against Them Under the Principles of Escobedo v. Illinois.

Escobedo v. *Illinois,* 378 U.S. 478 (1964), establishes that a panoply of specific constitutional rights are operative against the States during police interrogation of suspects. As in *Escobedo,* statements were extracted from petitioners during police interrogation of them as murder suspects in violation of their constitutional rights. As in *Escobedo,* the admission into evidence of those statements requires invalidation of their convictions.

Prior to the *Escobedo* decision, admissibility of the fruits of police interrogation was gauged on a measure of coercion or involuntariness that derived from *Brown* v. *Mississippi*, 297 U.S. 278 (1936), based upon the general guarantee of due process of law of the Fourteenth Amendment. *Escobedo* makes clear that this is not the sole constitutional norm applicable to that stage of the criminal process. Specific provisions of the Bill of Rights are to be brought to bear, including the right to remain silent and the privilege against self-incrimination of the Fifth/Fourteenth Amendments and, above all, the right to counsel of the Sixth/Fourteenth Amendments.

In so holding, the Court did not make any sharp break with the past. An unmistakable process of development marks the line of cases from *Brown* v. *Mississippi*, *supra*, to *Haynes* v. *Washington*, 373 U.S. 503 (1963). Explicit recognition of the applicability of Fifth and Sixth Amendment bulwarks to the process of police taking incriminating statements is not in the least novel. See *Bram* v. *United States*, 168 U.S. 532 (1897), quoted in the *Escobedo* opinion, 378 U.S. at 485-486; *Gallegos* v. *Colorado*, 370 U.S. 49 (1962).[6]

This is not to say that the effect of the rationale in *Escobedo* is inconsequential. Focusing the particular provi-

[6] This Court has repeatedly noted the absence of counsel during interrogation as an element in determining whether there had been overreaching by the police. See *Gallegos* v. *Colorado*, 370 U.S. 49 (1962); *Reck* v. *Pate*, 367 U.S. 440 (1961); *Blackburn* v. *Alabama*, 361 U.S. 199 (1960); *Payne* v. *Arkansas*, 356 U.S. 560 (1958); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Haley* v. *Ohio*, 332 U.S. 596 (1948); *Ward* v. *Texas*, 316 U.S. 547 (1942); *White* v. *Texas*, 310 U.S. 530 (1940); *Chambers* v. *Florida*, 309 U.S. 227 (1940).

sions of the Bill of Rights on the particular circumstances of the interrogation process produces a sharper image of the contours of constitutionally permissible police conduct. It relates the process of the precinct station to the process of the grand jury room and the courtroom and other significant stages of the criminal prosecution. It identifies vividly the fundamental quality of interests of liberty that must be preserved.

To bring petitioners' cases within the rationale of *Escobedo* does not require that that decision be read as announcing any radical new constitutional doctrine. Thus, it does not require a sweeping interpretation, as some have said, that counsel must be present at all times during communication between the police and criminal suspects. It does not require an interpretation suppressing every statement of such a suspect under the privilege against self-incrimination. This Court's opinion in *Escobedo* repeatedly noted the decision there was made in light of all the circumstances of that case. An excessively broad, doctrinaire reading of the decision is unwarranted on the face of the opinion. The case is a measured step forward in the articulation of standards to govern police interrogation. Under those standards, the statements extracted from petitioners were taken in violation of their constitutional rights.

A. Comparison of the Facts of Escobedo With the Facts in Petitioners' Cases.

The particular facts in these cases, in sum, present a picture of overreaching by the officers of the State to an extent equal to, or greater than, that in *Escobedo*. "The terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it." *Culombe*

v. *Connecticut*, 367 U.S. 568, 581 (1961) (Opinion of Mr. Justice Frankfurter). Cassidy and Johnson stood helpless against that terrible engine. They needed and were denied the assistance of counsel. Because they lacked the aid of counsel, they were exploited for the information necessary to condemn them before the law. Each was made "the deluded instrument of his own conviction." See *ibid.* In short, they were effectively denied the privilege against self-incrimination. The helplessness of petitioners, their particular need for counsel to protect their rights, especially the right to remain silent in the fact of unyielding interrogators, is compellingly revealed in these cases.

1. *Stanley Cassidy's Statements.*

Stanley Cassidy was the object of a secret inquisition that lasted from 4 A.M. until midnight of January 29, 1958. [T.R. 90, 92, 135] During those twenty hours, he was subjected to a barrage of interrogation, including three statements, formally recorded by a court stenographer, taken at 9 A.M., [T.R. 113] 12:15 P.M., [T.R. 130] and 11:40 P.M. [T.R. 135] With no prior criminal record, even of arrest, Cassidy was completely disoriented from the world he knew and from which he might have found support. [T.R. 365; CA/JA 37a] He was surrounded by known hostile forces and subjected to coercing impingements and undermining, even if not obvious, pressures of every variety. He was completely at the mercy of those whose job it was to prosecute him.

Cassidy's solitary ordeal began with a dread middle-of-the-night arrest. The record shows no indication that the seven man squad of officers had or displayed a warrant. [T.R. 90-92] Cassidy was detained thereafter in the Cam-

den City Hall, the building that also houses the courts of Camden County. Although the courts were then in session in the very same building, his captors did not take him before any judicial officer. They were intent upon first securing from him iron clad evidence of first degree murder. In the prosecutor's words, "these confessions were merely the bow to dress up the knot that tied this whole package together." [T.R. 305] Toward this end, the police deliberately and calculatingly flouted the law. New Jersey requires that every person arrested must be taken before a magistrate without unnecessary delay. N.J.R.R. 3:2-3(a). Thus illegal detention followed apparently illegal arrest.

The cross-questioning to which Cassidy was subjected, as described in his own words, was too much for him to cope with alone:

> "When I first was locked up there was questions being asked of me from everyone in the room." [T.R. 229] I was questioned when I was picked up about armed robbery, and I tried to tell them that it was no armed robbery, and the officers, *they kept saying that it was an armed robbery, because they knew that we went there to rob the man, because Hamilton had told them that.* And, I said, 'Well, I don't know anything about any robbery.' [T.R. 227] (Emphasis added).
>
> "So, when I first got picked up, I was picked up by Officer Jones, Officer Sunkett and Large's brother, Phil Large, and a couple of other officers: so, they took me upstairs into the interrogating room and first thing they started, asked me where I had been all day and I told them that I had been around, and they asked me the things that I had done.

"So, they asked me did I use drugs, so at first I denied that I used drugs, so they kept on questioning me and questioning me, and everything, and so I finally admitted that I do use drugs.

". . . so, I was sitting there, so Phil Large, he jumped up, he said, 'I don't want to hear that there.'

"He said, 'You know what I want from you.'

"He said, 'I want to know about this robbery.'

"I said, I tried to explain to him that I knew nothing about no robbery. So, he kept on, got riled out and everything, threw a telephone book at me, and I blocked it with my hand. He was angry because he said I wasn't cooperating with him the way he wanted me to. He said, because I knew what he wanted, *because he already had a statement saying that I went to rob Mr. Davis.* (Emphasis added).

"So, I kept on telling him I didn't go to rob Mr. Davis out of anything. I went to the store with Sylvester to see about collecting a debt." [T.R. 227-228]

The psychological duress that can be brought to bear in the course of secret interrogation of a suspect, alone, without counsel or any friend to support him, is revealed in Cassidy's description of the police use of the specter of the electric chair to panic the suspect.

"The detectives, at one time, put some chairs together to show me what the electric chair looked like. They told me to sit in the chair with my arms on the arm rests and my legs and back firmly against the chair. I was told to sit up straight. Over my arms and legs were shackles like the electric chair. In back of my head they put a telephone book. I was told to imagine

over my head a mask, then they said: 'The switch is about to be thrown' and then said: 'It was thrown' and at that time one of them hit the book in the back of my head. I was frightened crazy." [T.R. 366]

Not only was Cassidy thus subjected to intensive interrogation by a battery of police officers, but he was also faced with the more subtle and difficult forms of pressure that skilled interrogators are wont to use. He was confronted with quotations said to have been taken from the confession of Wayne Godfrey allegedly implicating Cassidy, and to underscore the effect, the police brought Godfrey into the room briefly. [T.R. 366] Later, after his first formal statement had been taken, Cassidy was interrogated by the Prosecutor himself who induced Cassidy to disclose the whereabouts of a gun. The Prosecutor said that he only wanted to see whether the gun had been fired and that, if the gun had not been fired, Cassidy would be cleared of any murder charge. [T.R. 232-233, 367] It was impossible for Cassidy, without the aid of counsel, to understand the significance of the statements Godfrey had allegedly given to the police, to realize that any such statements could not be used as evidence against anyone other than Godfrey. Cassidy likewise urgently needed assistance of counsel to appreciate the inducements that the Prosecutor employed in seeking information about the gun.[7] The

[7] In the petition for certiorari filed in this case, a separate question was presented of the constitutionality of the admission into evidence of the gun discovered as a result of the Prosecutor's misleading assertions to Cassidy, that the police wanted the gun only to see if it had been fired, that it would not be used as evidence, and other inducements. The petition for certiorari was filed before this Court's decision in *Linkletter* v. *Walker*, 381 U.S. 618 (1965). Under the rationale of *Linkletter* it appears that

intricate web of a felony-murder prosecution being spun by the Prosecutor and police was totally beyond the comprehension of this hapless individual.

Cassidy was inherently unable to meet this situation without the guidance and support of counsel. He was a chronically unemployed Negro, twenty-five years old. His education had terminated at the eighth grade. During the four days before his arrest and interrogation, he had been using drugs "pretty heavy" and was weakened by the effects of narcotic intoxication. [CA/JA 355a-356a] Psychiatric and psychological experts at the State's own Diagnostic Center unanimously describe him as an inadequate personality: "a highly conflicted, immature individual", "deep feelings of incompetence", "anxiety and great dependence", "an extremely inadequate, regressed, passive individual." [CA/JA 28a-34a] His requests for counsel were unavailing. [T.R. 365, 367]

Three times during the twenty hours of illegal detention, the skilled Chief of County Detectives took question and answer statements, formally recorded by a court stenographer, from Cassidy. He did not have counsel to advise him. He inculpated himself in a robbery-murder. At the outset, the transcript indicates that the Chief of Detectives, an experienced interrogator, warned Cassidy that the should tell the truth of his own free will, knowing that the

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the admission of the gun into evidence in a 1959 case, which became a final judgment prior to the decision in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), does not provide a valid ground for relief to these petitioners. Accordingly, that contention has not been argued in this brief. This does not diminish the force of the contention that the situation posed a critical need for counsel on the part of Cassidy.

statement could be used against him. [T.R. 114] Cassidy was not advised by Chief Dube, or anyone else, that he had an absolute right to remain silent. Cassidy was not advised by Chief Dube, or anyone else, that he had a privilege against self-incrimination. Cassidy was not advised by Chief Dube, or anyone else, that he had a right to assistance of counsel.

Completely alone, cut off from family and friends, unlawfully deprived of liberty by police, denied any judicial hearing where he would have been advised of his constitutional rights, this wholly inadequate and ineffectual person desperately needed the assistance of counsel. "[W]e deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefit of his constitutional rights." *Gallegos* v. *Colorado*, 370 U.S. 52, 54 (1962). A lawyer could have given Cassidy the protection which his own weakness and inadequacy could not. "To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights." *Id.* at 54-55.

2. *Sylvester Johnson's Statement.*

Sylvester Johnson's need for the assistance of counsel to provide some semblance of significance to his constitutional rights was equal to or greater than Cassidy's. Twelve hours after his arrest, at 4:45 A.M., in the predawn hours of the morning of January 30, 1959, Johnson was made the instrument of his own destruction in the office of the Chief of Camden County Detectives. [T.R. 93, 201] The circumstances of Johnson's statement, like

those in *Escobedo*, render that statement inadmissible for lack of counsel to advise him meaningfully of his privilege against self-incrimination and his absolute right to remain silent despite the manifold pressures invoked by the police.

One of the most striking similarities between the plight of Johnson and that of Escobedo arose from the use by their interrogators of inculpatory statements previously taken from other defendants. The police themselves conceded that they told Johnson he had been named as the "triggerman" by Cassidy and the third defendant, Wayne Godfrey.[8] [T.R. 200] In both cases, the subjects of the immediate interrogation were confronted physically with the persons who had given the inculpatory statements. [T.R. 381] The legal nicety of this situation was particularly noted by this Court in *Escobedo*. The uncounselled laymen would assume that such statements could be used as damning evidence against him. Indeed, in Johnson's case, he was told by Chief Dube, quite incorrectly, that such statements could be used against the person who made it and other persons. [T.R. 184] Beyond the direct evidentiary harm that such statements might be thought to portend, this Court considered the likelihood that the person confronted with the accusation would naturally fear that silence in the face of the accusation could be taken as damning admission. Only a lawyer could advise such a person of the ramifications of the statements that had been made against him and the consequences that might follow if he remained silent or if he spoke.

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[8] The police also made use of information obtained from Noah Hamilton, a subsequent witness for the prosecution.

In *Escobedo* the Court found the need for counsel in this situation to be of the most significant importance. Even though the defendant there had previously conferred extensively with counsel, the lawyer's advice had not covered what the defendant should do in the face of an accusation by another defendant. Johnson, on the other hand, had not had the benefit of any discussion with any counsel at all. His requests for counsel were futile. He had had no legal advice on how to cope with anything the police might do to him, much less the legal import of the statements, apparently highly damaging to him, that the police had extracted from Cassidy and Godfrey.

Additional circumstances in Johnson's case made it urgent that the right to counsel be recognized with respect to his interrogation. Johnson was twenty-one years old at the time, a Negro who had left school at the seventh grade. Psychological and psychiatric experts at the State's Diagnostic Center stressed the inadequacy and insecurity conspicuous throughout his entire life. [CA/JA 17a-27a] One noted that his "stability and judgment go to pieces under duress and stress." [CA/JA 27a] Although he had one prior conviction, his experience did not begin to equip him with the background to protect his own rights. His pre-dawn interrogation in Chief Dube's office followed a middle of the night ride from Newark, where he had been arrested, to Camden. Fatigued from lack of sleep, he was further weakened by the effects of heavy use of narcotics for several days prior to his arrest. The mounting coercion, physical and psychological, applied to Johnson is evident in his description of what transpired in Newark and in the police car on the way to Camden.

"I was interrogated in Newark by three Camden detectives, two Newark detectives, and first they told me they wanted me for a murder.

"I told them that I did not know of any murder, and they kept questioning me and everything, and they said *'We know of the murder and we know you are involved.* There was a robbery' and at the time I did continue to deny it. (Emphasis added).

"So they said to me, they said, 'Cassidy and Godfrey and Noah Hamilton are in custody in Camden' and *they said they had statements saying that I committed a robbery.* (Emphasis added).

"At the time I told them, I said, 'Well, I know of the murder, but there was no robbery.'

"I said that I did not commit a robbery, and then I went on and told them exactly what had happened." [T.R. 207]

This came out in cross-examination by the prosecutor:

"Q. Did any officer beat you up?

"A. Yes, I was hit in Newark.

"Q. Hit in Newark?

"A. Yes, several times.

"Q. Did Chief Dube beat you up?

"A. Chief Dube?

"Q. Yes.

"A. No.

"Q. Did any other detectives beat you up while you were in Chief Dube's office?

"A. Not in his office.

"Q. What is that?

"A. Not in his office.

"Q. Where, did anybody beat you up in any other place?

"A. In Newark, and on the way coming to Camden." [T.R. 226]*

At the conclusion of the drive from Newark, Johnson was taken immediately to the office of Chief Dube. [T.R. 196-197] The interrogator gave his stock warning that the prisoner should tell the truth of his own free will, knowing that the statement could be used against him and others. [T.R. 184] Chief Dube did not advise Johnson of his constitutional privilege against self-incrimination and his absolute right to remain silent. Nor did he advise Johnson of his right to consult with counsel before making a statement. In total ignorance of his legal rights, this young, poorly educated Negro—debilitated by interrogation, lack of sleep and the after-effects of narcotics, isolated from family and friends, a person in whom insecurity and inadequacy were conspicuous—faced the skilled inquisitor and forfeited his life. Such a person, in these circumstances, has an overwhelming need for the guiding hand of counsel. [T.R. 381-382]

On the totality of the circumstances in their cases, petitioners Cassidy and Johnson, like the petitioner in *Escobedo,* were denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment. The incriminating statements elicited by the police during their

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*The witness did not accept the prosecutor's invitingly leading description of the extent of the physical violence. It would obviously be better for Johnson's case if he could testify truthfully to having been "beaten up". However, he did not accept the prosecutor's phrase, but testified only to the simple fact that he had been hit, several times, in Newark and coming to Camden.

interrogation may not be used against them at a criminal trial.

B. Absence of a Problem of "Retroactivity".

The Supreme Court of New Jersey rested its decision denying relief under *Escobedo* entirely on the ground that "*Escobedo* stands for a new rule of constitutional law which does not depend on voluntariness" [T.R. 394], that the new rule is "calculated to prevent police interrogation, without the presence of counsel, of a suspect accused of crime" [T.R. 356], and that such a new rule, whose purpose can only be deterrence of illegal police conduct, should not be given retroactive effect.[10] By an unwarranted and unduly broad statement of the "rule" of *Escobedo*, the State court artificially created an apparent problem of retroactivity.

The illusoriness of the retroactivity issue is revealed if *Escobedo* is read, as this Court's opinion repeatedly directed, in light of the facts of the case. As noted earlier, *Escobedo* is well within the line of precedents of this Court dealing with the inadmissibility of pre-trial statements of defendants under the rubric of involuntariness. There are no major distinctions between *Escobedo* and, for example,

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[10] The New Jersey Supreme Court also intimated that no question arises as to the reliability of the determination of petitioners' guilt. [T.R. 335] The court rests this in part on the trial strategy of defense counsel. The soundness of counsel's decision, in light of the information and resources available to them, need not be re-examined. Suffice it to say here that, since 1960, petitioners have denied the truth of the confessions and continue to do so. They testified that they went to the victim's store to get money, in payment of a debt, rather than the version developed under police interrogation, that they went to rob. Since their convictions rest on a felony-murder theory, the difference is crucial, a matter of life and death.

Haynes v. *Washington*, 373 U.S. 503 (1963); or *Lynumn* v. *Illinois*, 372 U.S. 528 (1963); or *Gallegos* v. *Colorado*, 370 U.S. 49 (1962); or *Haley* v. *Ohio*, 332 U.S. 596 (1948). In 1960, this Court declared that the doctrine excluding from evidence coerced confessions was a many faceted rule. "Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case." *Blackburn* v. *Alabama*, 361 U.S. 199, 207 (1960). *Escobedo* expands on the shorthand by articulating that the right to counsel and the privilege against self-incrimination are factors that operate in the detention room at the police station.

During most of the life of the constitutional exclusion of unlawfully extracted confessions, it was not accepted that any of the specifics in the Bill of Rights dealing with criminal prosecutions applied to the States. Exclusion rested upon the Due Process Clause of the Fourteenth Amendment. In recent years, this Court has come to the view that the vital provisions of the Fourth, Fifth, Sixth, and Eighth Amendments do govern State criminal process.[11] It is a not unexpected development, therefore, that the early doctrine on admissibility of confessions would be recast and rearticulated in light of the privilege against self-incrimination and the right to assistance of counsel.[12]

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[11] E.g., *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Robinson* v. *California*, 370 U.S. 660 (1962).

[12] A similar evolution occurred in the development from *Powell* v. *Alabama*, 287 U.S. 45 (1932), to *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). No serious problem of retroactivity was found to exist.

In so doing, the Court has not shattered any existing constitutional rules; it has not overruled any established precedents; it has not invented any far-reaching and dramatic new doctrine. *Escobedo,* properly interpreted in light of the circumstances of that case and the pre-existing norms on the eliciting of incriminating statements, gives rise to no problem of retroactivity.

The admissibility of the incriminating statements elicited from petitioners Johnson and Cassidy might be measured on the pre-*Escobedo* formula which wove together a complex strand of values into the convenient shorthand expression of involuntariness. On the basis of this Court's decisions, their confessions were "involuntary". *Haynes* v. *Washington, supra; Lynumn* v. *Illinois, supra; Gallegos* v. *Colorado, supra.* It is not necessary any longer to use the old shorthand, however. Under *Escobedo* it is equally true that, on the particular facts of these cases, they have been denied their privilege against self-incrimination and their right to assistance of counsel at a crucial stage of the proceedings against them.[13]

[13] Compare *Pointer* v. *Texas,* 380 U.S. 400 (1965).

II.

The Prosecutor's Comments and the Trial Court's Charge to the Jury on the Failure of the Defendants to Testify Deprived Petitioners of Their Constitutional Rights Against Self-Incrimination, and Their Convictions Should Be Reversed Even Though They Were Tried Prior to the Decisions of this Court in Malloy v. Hogan and Griffin v. California, and Even Though the Major Contested Issue Was the Choice Between Imposition of Life Sentence or the Death Penalty.

Petitioners were tried in January, 1959, prior to the decisions of this Court in *Malloy* v. *Hogan*, 378 U.S. 1 (June 15, 1964) and *Griffin* v. *California*, 380 U.S. 609, 14 L.ed.2d 106 (April 28, 1965). During the trial none of the defendants took the stand to testify concerning guilt or penalty.[14] In fact, the defendants did not offer any evidence at all to contest their guilt or to assist the jury in arriving at the penalty.[15] In his closing summations to the jury, the prosecutor made comment upon this failure. In his first closing speech, the prosecutor argued:

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[14] New Jersey does not provide a "split verdict" trial, as do many other states, including California. See *Griffin* v. *California*, *supra*, 380 U.S. at 609, 14 L.ed.2d at 107, fn. 1.

[15] At the time of the trial, New Jersey decisional law did not permit the defense to offer background evidence in order to assist in the determination of penalty. See *State* v. *Wise*, 19 N.J. 107, 115 A.2d 62 (1955). After the conviction of the petitioners had been affirmed by the Supreme Court of New Jersey, and while a motion for new trial was pending, the Supreme Court of New Jersey rendered a decision in *State* v. *Mount*, 30 N.J. 195, 152 A.2d 343 (1959), which reversed a conviction because background evidence had been rejected. Petitioners' subsequent attempts to obtain relief on the basis of the *Mount* decision proved futile. 34 N.J. 212, 168 A.2d 1 (1961), cert. denied, 368 U.S. 933, 7 L.ed.2d 195 (1961); 37 N.J. 19, 179 A.2d 1 (1962), cert. denied, 370 U.S. 928, 8 L.ed.2d 508 (1962).

"At this point, at this point in my summation, in these opening remarks, I would devote my next few moments to discuss the evidence that might have been presented by the defense, but I am not going to do that. I am sure you follow me in my reasoning. It is very simple reasoning. The reason I am not going to discuss the defense is because there was no defense to the State's case. I say to you, most respectfully, that the State proved its case beyond, beyond any reasonable doubt. The State proved its case beyond any doubt. The defendants chose not to take the stand in their own defense. That was their right. They have a right under the law not to take the stand. However, the Court will charge you as the law that where the defendants refuse to take the stand in their own defense, that from their failure to testify in their own behalf, you, the jury, may infer that they could not truthfully deny the incriminating facts that were proved against them. I will leave that to you and perhaps comment upon it later." [T.R. 255-256]

There was no objection by defense counsel because this type of comment was specifically rendered permissible by New Jersey law.[16] However, it did provoke responses from

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[16] New Jersey Statute, N.J.S. 2A:84A-17, Rule 23, (4), provides: "If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment on his failure to testify, and the trier of fact may draw an inference that the accused cannot truthfully deny those facts." The precursor of this Statute received the judicial approval of the New Jersey Supreme Court in *State* v. *Colby*, 28 N.J. 106, 145 A.2d 289 (1958). As noted by this Court in *Griffin, supra*, 380 U.S. at 611, 14 L.ed.2d at 108, fn. 3, the Constitution of New Jersey does not contain any provision embodying the privilege against self-incrimination.

counsel for each of the defendants. Pinioned on the twin horns of the dilemma caused by the state law's prohibition against introducing background evidence to mitigate the penalty, and the right of the prosecutor and court to testify on the failure of defendants to take the stand, the helpless defense counsel in their summation were forced to concede the guilt of their clients and attempt to plead for mercy on the ground that there had been no plan to murder, but only to rob. In the final closing speech the prosecutor drove the knife home—and twisted it—when he argued:

"Ladies and gentlemen, now I hear, and now I understand why they said nothing last Friday when they opened, why these attorneys didn't make any claim for a defense. Now it is crystal clear. Now they finally admit. What was there to deny? The State had proven a clear case. The defendants had confessed to it. We merely are here as observers. This is the situation and now they don't even take the opportunity to get on the stand. Why speaks for these defendants? Are the attorneys speaking for the defendants? And why shouldn't the defendants speak for themselves; when someone says that he is sorry or he is sorry or he is sorry, why don't we have the opportunity to hear whether or not they are sorry? This they denied themselves. They denied it to you and to everyone else, the opportunity to hear for themselves. Wouldn't this have indicating some sorriness on their parts? They wouldn't expose themselves on the stand. They didn't dare get on the stand. They would rather hide behind some self-serving statement snatched out of context or otherwise in a confession. They didn't dare take the stand and bare their breasts and say we are

> sorry. Therefore, you have a right, and intelligently so and logically so, to say the reason they didn't take the stand is because they could not truthfully deny the incriminating evidence proved against them, and the Court, I trust, will charge you the law on this situation." [T.R. 305]

As expected, the trial judge in charging the jury lent weight to the prosecutor's argument. Even though he did instruct the jury that failure of a defendant to testify on his own behalf raises no "presumption of guilt," and should not be considered as prejudicial in determining penalty [T.R. 332], he went on to add:

> "If any inculpatory or incriminating facts are testified to which concern the acts of that particular defendant which he could by his oath deny, his failure to testify in his own behalf raises an inference that he could not truthfully deny those inculpatory or incriminating facts." [T.R. 332]

Although New Jersey law prevented defense counsel from successfully objecting to this type of summation and charge, on direct appeal of the convictions, the Supreme Court of New Jersey was apparently disturbed by the totally inflammatory nature of the remarks of the prosecutor, and on its own motion[17] it requested consideration of the propriety of the prosecutor's summation. This was argued on supplemental briefs. Nonetheless, that Court concluded that the prosecutor's remarks "did not prejudice the substantial rights of the defendants." 31 N.J. at 512, 158 A.2d at 24. However, the consideration of this question

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[17] See 31 N.J. at 510, 158 A.2d at 22.

was based entirely upon domestic law of New Jersey. Until the present post-conviction application, the question was never raised in terms of the requirements of the Constitution of the United States.

Although the Supreme Court of New Jersey, after the decision of this Court in *Malloy* was raised by petitioners in this post-conviction proceeding, still had some doubt as to whether *Malloy* forbade the type of comment indulged in by the prosecutor and the charge rendered by the trial court here,[18] such doubt has clearly been laid to rest by the decision of this Court in *Griffin*. Nonetheless, two questions remain unanswered: first, are these decisions applicable to cases which were tried prior to their announcement; and second, do they apply where the main issue contested is the penalty to be imposed, even though the question of guilt or innocence necessarily remained.

A. *Retrospective application.* This Court has already heard argument, and may even render a decision before argument in the instant case, in a case which raises a similar issue. In *Tehan* v. *Shott*, October Term, 1965, No. 52, the remarks of the prosecutor in that case were mild compared to the prosecutor's comments in this case; furthermore, in *Tehan* there was no instruction by the Court supporting those remarks, as there were in the case at bar. The conviction was affirmed by the Ohio Court of Appeals and the Ohio Supreme Court, with certiorari being denied by this Court. On collateral attack by writ of habeas corpus in the federal courts, the United States District Court dismissed the writ. The appeal was argued in the Court of Appeals for the Sixth Circuit the day after this Court's

[18] See T.R. 358-359.

decision in *Malloy*; the Court of Appeals properly interpreted the *Malloy* decision and reversed and remanded to the District Court, which in turn remanded to the state courts for appropriate action within ninety days. No steps were taken to stay the effectiveness of the District Court's order; nonetheless, a petition for certiorari to review the order of the Court of Appeals was filed in this Court. Subsequently, the decision in *Griffin* was announced. Shortly thereafter this Court granted certiorari in *Tehan*, requesting argument on the retroactivity of the *Griffin* doctrine.

One very significant distinction between *Tehan* and the case at bar (besides the more damaging nature of the comments and charge in the case at bar) is the fact that in *Tehan* the appellate court found that *Malloy* applied, while here the appellate court concluded that it did not. Each arose by collateral attack, rather than direct appeal; in each the collateral attack on the prosecutor's comments was initiated prior to the *Griffin* decision.[19]

In *Tehan*, counsel for Respondent vigorously urged that no issue of retroactivity was involved, since the decision of the Sixth Circuit, correctly anticipating the doctrine of *Griffin*, was rendered prior to this Court's opinion in that case.[20] If he is correct, then the same principle is applicable here. No rational distinction in result can be grounded

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[19] It is true that in *Tehan* the collateral attack was also initiated prior to the decision in *Malloy*, while here it was not filed until after the *Malloy* decision. However, it is interesting to note that this Court did not deny certiorari from the decision of the Third Circuit until June 15, 1964—the very day that it announced the decision in *Malloy*.

[20] Brief of respondent, *Tehan* v. *Shott*, Oct. Term, 1965, No. 52, pp. 11, 13-16.

upon whether the appellate court whose decision is being reviewed in this Court found for or against petitioner—or, in other words, whether the state or defendant is the moving party in this Court.

Significantly, it must be noted that the comments made by the prosecutor and the trial court here were demonstrably more prejudicial and inflammatory,[21] since they not only related to a lack of defense, but they suggested that defendants were not even sorry about the crime. This, along with the totally inflammatory nature of the summation, raises questions of due process as well as privilege against self-incrimination. By the use of a trained and fertile imagination, the prosecutor was able to suggest to the jury inferences not arising from any evidence but merely from failure of defendants to testify or present evidence—inferences which may be just as untrue as facts obtained by coerced confessions. As noted by this Court in *Malloy*, coerced confessions are excluded not solely because of the fear that they may be inaccurate, but because they run counter to the accusatorial, rather than inquisitorial, system of criminal prosecution in America. For reasons already advanced in this brief, Argument I *supra*, and for reasons advanced in the cases to be argued at the same time, the principle relating to coerced confessions should be applied retrospectively. The rationale applies equally forcefully to reversing convictions obtained by unconstitutional self-incrimination as to those obtained by coerced confessions.

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[21] Not only did prosecutor comment about failure to testify, but his entire summation was highly inflammatory. See Argument V, p. 55, *infra*.

In refusing to apply the exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961) retroactively, this Court suggested in *Linkletter* v. *Walker*, 381 U.S. 618 (1965) that tangible evidence obtained illegally was no less true because obtained in an unconstitutional manner. However, where evidence has been *created* by the fertile imagination of a trained, experienced prosecutor, in violation of the constitutional rights of defendants, the fear expressed in *Linkletter* of taxing the administration of justice is far outweighed by the same principles of justice which require the retroactive application of due process decisions: "the principle that we applied went to the fairness of the trial—the very integrity of the fact finding process." 381 U.S. at 639. It is that integrity of the fact finding process which was assailed by the prosecutor's and trial court's unconstitutional conduct here.

B. *Applicability to Penalty.* The Supreme Court of New Jersey concluded that the comments of the prosecutor and the trial court could not have influenced the jury in its determination of the defendant's guilt, and that since the trial court had instructed the jury not to consider the failure of defendants to testify in determining whether to recommend life imprisonment,[22] this "could not have ad-

[22] "None of the defendants took the stand to deny their participation in the crime. Under our law, a defendant cannot be compelled to testify but he is competent to testify, and he has a right to testify, and his failure to be a witness in his own behalf is no presumption of guilt and does not erase the presumption of innocence. The failure of the defendants to take the witness stand should not be considered as prejudicial in respect to your determination as to whether or not you should attach to your verdict the recommendation of life imprisonment, in case you, the jury, should find any of the defendants guilty of murder in the first degree." [T.R. 332]

versely affected defendants' rights to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." [T.R. 359] In effect, the Supreme Court of New Jersey was thus applying a doctrine of "harmless error." This was palpably wrong for three reasons. First, it ignores the fact that *Malloy* and *Griffin* were not based on considerations of due process, but of applicability of the privilege against self-incrimination. There can be no question but that constitutional rights apply to the sentencing procedure as well as to determination of guilt or innocence. *Townsend* v. *Burke*, 334 U.S. 736 (1948). Accuseds are entitled to have counsel at every stage of the proceedings against them, including sentencing: *Petition of Ellisor*, 293 F.2d 175 (5th Cir. 1956); *Green* v. *Robbins*, 218 F.2d 192 (1st Cir. 1954). This is even true after a plea of guilty. *Townsend* v. *Burke, supra.* There can be no rational reason for denying to a defendant the constitutional privilege against self-incrimination once his guilt has been judicially determined. This is vividly underscored in the case at bar where the major issue presented by defense counsel to the jury was the choice between life imprisonment and the imposition of the death sentence—and the jury was deprived of the opportunity of hearing background evidence[23] and the statute establishes no standards to be applied in determining which penalty to impose.[24]

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[23] See footnote 15, *supra.*

[24] The failure of the statute to establish standards was attacked by these petitioners in the Supreme Court of New Jersey where, on appeal from the lower court's denial of motion for new trial, it was contended that the statute was unconstitutional, denying due process and equal protection. This contention was rejected. 34 N.J. 212, 168 A.2d 1 (1961). An appeal to this Court was dismissed for want of a substantial federal question. 368 U.S. 145, 7 L.ed.2d 188 (1961).

Second, no matter what tactic the defense followed, the jury was not, and could not be, relieved of its responsibility to determine whether defendants were guilty of the specific crime charged. N.J.S. 2A:113-4. The inferences suggested by the prosecutor and Court which they created from the failure of defendants to testify, may have affected the fairness of the jury's determination of guilt as well as penalty.

Third, the New Jersey Supreme Court's "harmless error" rationale conflicts with this Court's decisions that constitutionally objectionable evidence cannot be considered "harmless." See *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), where the Court cited *Silverthorne Lumber Co.* v. *United States*, 151 U.S. 385 (1920); *Nardone* v. *United States*, 308 U.S. 338 (1939); and *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

III.

Where the Confession of One Defendant, Later Held to Have Been Obtained in Violation of the Constitutional Rights of That Defendant, Led to the Confessions of Both Petitioners, the Admission of Their Confessions Is an Unconstitutional Deprivation of Their Rights.

Here the Court of Appeals for the Third Circuit held that the formal statements of Wayne Godfrey, given at 10:25 A.M. on Wednesday, January 29, 1958 [NJ/JA 506a, et seq.] less than nine hours after he was arrested, and at 11:15 P.M. that evening, [NJ/JA 540a, et seq.] were obtained from him through an unconstitutional use of physical and mental coercion. 327 F.2d 311 (3d Cir. 1964). Petitioner Johnson was arrested when Godfrey who had already given the first of his statements, brought the police to the home of Johnson's uncle in Newark. [T.R. 93] According to Johnson, he was told that Godfrey and Cassidy had already confessed and they were brought in to identify him as the one who had actually done the shooting. [T.R. 380-381] Thus, it is clear that Godfrey's confession played an important role in inducing Johnson to implicate himself.

The facts are not as clear with respect to Petitioner Cassidy. According to Cassidy's affidavit, he had at first refused to make a statement, and then continued to deny everything, despite continuous questioning and threats. Finally, one of the detectives read him quotations from some written statements, and told him that Wayne Godfrey had said he was involved. "They said they knew everything and that I might as well tell them the truth." Then they brought in Wayne Godfrey to identify him, without allowing them to speak to each other. [T.R. 365-366] Although the first of Godfrey's recorded statements which were intro-

duced into evidence did not commence until 10:25 A.M., he had already been interrogated for over 20 hours, and it is reasonable to infer that Godfrey had already made statements incriminating Cassidy and Johnson. Actually, however, Cassidy was the first to give a formal statement, which commenced at 9:00 A.M. and ended at 10:20 A.M. [NJ/JA 456a et seq.] As already noted, Godfrey's first formal statement commenced at 10:25 A.M.—only five minutes after Cassidy finished giving his first—and concluded at 12:00 Noon. [NJ/JA 539a] This seems to confirm Cassidy's affidavit that "about an hour or so" after his first statement he was taken to a room where Godfrey told him that he had confessed. [T.R. 367] Then he was taken to another room, questioned some more about the gun, and a second statement was taken. [*Ibid.*] According to the stenographer, Cassidy's second statement commenced at 12:15 P.M. [NJ/JA 482a] Thus, it appears that Godfrey's oral admission and his presence were used to induce Cassidy into believing that Godfrey had incriminated him; that this impression statement was then used to extract confessions from Cassidy.

Since the Court of Appeals has held that Godfrey's statements were obtained in violation of his constitutional rights, it follows that not only may that statement not be admitted into evidence against him, but it may not be constitutionally utilized as a tool for obtaining evidence from others. The language of this Court in *Fahy* v. *Connecticut*, 375 U.S. 85, 91 (1963), is highly relevant:

> "As the Court has noted in the past: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.' See Silverthorne Lumber Co. v. United

States, 251 U.S. 385, 392, 64 L.ed. 319, 321, 40 S.Ct. 182, 24 ALR 1426; see also Nardone v. United States, 308 U.S. 338, 84 L.ed. 307, 60 S.Ct. 266; Wong Sun v. United States, 371 U.S. 471, 9 L.ed.2d 441, 83 S.Ct. 407. Thus petitioner should have had a chance to show that his admissions were induced by being confronted with the illegally seized evidence."

We are not here attempting to relitigate the issue tried on the direct appeal in this case—namely, that the admission of Godfrey's confessions prejudiced them—as the Supreme Court of New Jersey apparently thought. [T.R. 363] Nor are we quarrelling with the findings of the Third Circuit as to Cassidy and Johnson on the record then before that court—as the Supreme Court of New Jersey also apparently thought. [T.R. 362] On the contrary, we are here suggesting that on the record before this Court, containing the affidavits of petitioners as well as the other evidence above referred to, and which is not contradicted by anything in the record, the statements of petitioners were obtained by use of unconstitutionally obtained evidence.

Nor are we trying to assert on behalf of these petitioners the constitutional rights of a third person, Godfrey. In *Wong Sun* v. *United States,* 371 U.S. 471 (1963), there were two petitioners. One, named Toy, had been arrested without a warrant under circumstances which led this Court to conclude that the arrest was unlawful. Accordingly, this Court excluded from evidence not only his statements to the police immediately after his arrest, but also the narcotics which they found in the possession of another individual named Yee, who they learned about from Toy. The

Court held that the discovery of the challenged evidence had not become so attenuated as to dissipate the taint of the original illegality, and that the evidence was come at by the exploitation of that illegality. As to the other petitioner, Wong Sun, however, a different conclusion was reached. Yee had told the agents that he had obtained the narcotics from "Sea Dog," and Toy identified "Sea Dog" as being Wong Sun. He then took them to Wong Sun's neighborhood where they located and arrested Wong Sun. Yee was called as a witness at their trial, but repudiated the statement he had given, and invoked his privilege against self-incrimination. No testimony was elicited from him identifying either petitioner. The Court held admissible as to Wong Sun the narcotics surrendered by Yee, even though it had been held inadmissible as to Toy.

> "The exclusion of the narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." *Id.* at 492. [Citations and footnote omitted.]

It is respectfully submitted that this case does not sanction the use of confessions obtained as a result of trickery and use of illegally obtained evidence. The obtaining of the statements from Johnson and Cassidy here was not so attenuated as to dissipate the taint of the illegality of Godfrey's arrest, detention and questioning. These statements were come at by the direct exploitation of that illegality. Unlike Wong Sun's situation, we are claiming

official impropriety in the obtaining of the statements from the persons against whom they are being used—namely, the utilization of unconstitutionally obtained evidence as a tool for obtaining the confessions of these petitioners. Where, as in *Fahy*, the illegally seized evidence inducted the admissions and confessions, then the admissions and confessions can no longer be considered "voluntary" in the constitutional sense. This is but a variant of the practice condemned in *Johnson* v. *Pennsylvania*, 340 U.S. 881 (1950), where the defendant's acquiescence in the coerced confession of a co-felon was held inadmissible.

IV.

Where Motions for Severance Are Denied, and Three Defendants Are Tried Jointly, and the Confessions of Each, Expressly Implicating the Others, Are Admitted into Evidence Over Objection, and Where Two of the Confessions Given by One of the Defendants Are Held to Be Coerced, Justice Requires That the Other Defendants Be Granted a New Trial Free From the Prejudicial Effect of the Coerced Confessions.

The three defendants gave six formal statements to the police after their arrest. Copies of these statements were ordered supplied to defense counsel by the Supreme Court of New Jersey on an interlocutory appeal. 28 N.J. 133, 145 A.2d 313 (1958). Each statement expressly implicated the other defendants. [See NJ/JA 458a, 485a, 492a, 508a, 541a, 555a, et seq.] Pre-trial motions for severance [NJ/JA 2a-3a] were denied [NJ/JA 4a], as were defense motions made during the trial to strike out objectionable and hearsay references. [NJ/JA 405a, 418a, 441a, et seq.] The Supreme Court of New Jersey, on direct appeal, af-

firmed the action of the trial court, concluding that the trial court had not abused its discretion, that the confessions were not in dispute on essential elements of the crime, that separate trials would have created almost insurmountable problems of administration, and that the trial judge gave instructions to the jury limiting the consideration of the confessions to the person giving them. 31 N.J. 489, 158 A.2d 11 (1960).

Subsequently, the two statements given by co-defendant Godfrey were held by the Court of Appeals for the Third Circuit to have been coerced. 327 F.2d 311 (3d Cir. 1964), cert. denied, 377 U.S. 984, 12 L.ed.2d 751 (1964).

Even if there had been no violation of the petitioners' constitutional rights in the utilization of the coerced confessions as a tool for obtaining damaging admissions from the petitioners, still the petitioners have been substantially harmed by the submission to the jury of this constitutionally inadmissible evidence—despite all of the limiting instructions by the trial judge. Not only did Godfrey's statements supply verification of the admissions in petitioners' own statements, but it cast blame on the others. For example, in his first statement Godfrey told how Cassidy told him that Johnson had killed the man. [NJ/JA 512a] He recounts how Johnson said "I had to kill him, I had to shoot him." [NJ/JA 513a] In his second statement he tells about two guns in the possession of Petitioner Cassidy. [NJ/JA 543a-544a] Both statements are replete with evidence implicating the other two defendants. [See NJ/JA 508a-551a; also, 441a et seq.]

It is a legal fiction to believe that the jury in this case was able to separate the confessions of each of these de-

fendants and compartmentalize them.[25] Justice Traynor, speaking for the California Supreme Court, has recently written a lucid and logical criticism of the use of joint trials in circumstances similar to that involved here. *People* v. *Aranda*, —— Cal. 2d ——, 34 U.S.L. Week 2261 (Nov. 12, 1964): Although recognizing that joint trials have been approved in the federal courts, *Delli Paoli* v. *United States*, 352 U.S. 232 (1957), he notes criticism of the procedure. He points out that it results in serious impairment of the rights of the accused to a fair consideration by an impartial jury of the competent evidence produced against him; it is a fiction and a naive assumption about the way juries can function; the rule calls upon the jury to perform a mental gymnastic which is beyond, not only their powers, but anyone's powers. He goes on to quote Justice Frankfurter, writing for four dissenters in *Delli Paoli*,[26] *supra*:

> "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. . . . The Government should not have the windfall of having the jury be influenced by evidence against a defendant

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[25] The New Jersey Supreme Court has very recently recognized the potential prejudice in admission of such confessions, despite cautionary instructions, especially where deletions have been refused. *State* v. *Young*, —— N.J. ——, —— A.2d —— (A-24, Sept. Term, 1965, Dec. 20, 1965).

[26] "Because of these close parallels between *Jackson* and *Delli Paoli*, *Jackson* may foreshadow a holding that the *Delli Paoli* procedure violates due process." 78 HARV. L. REV. 211, 213. See *Jackson* v. *Denno*, 378 U.S. 368, 388, 389 (1964).

which, as a matter of law, they should not consider but which they cannot put out of their minds. (p. 248.)"

He notes further:

"To these critics, the rule is not basic to our jury system and is not needed to preserve the system. Instead, it is a rule that perverts the jury trial since it calls upon ordinary lay people to obey an instruction that every judge realizes cannot be obeyed. It fosters what one scholar refers to as our 'inconsistent attitude' toward juries. We treat them 'at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects.' (Morgan, Some Problems of Proof under the Anglo-American System of Litigation (1956) p. 105.)

Whether or not these criticisms of the present rule require its abrogation, a question we consider later herein, they clearly foreclose any assumption that error in admitting a confession that implicates both defendants is rendered harmless to the nonconfessing defendant by an instruction that it should not be considered against him."

Justice Traynor goes on to point out the constitutional infirmity in relying upon the jury's ability to make this distinction:

"Although *Jackson* [*Jackson* v. *Denno,* 378 U.S. 368] was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely

on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.

"Indeed, the latter task may be an even more difficult one for the jury to perform than the former."

He concludes by pointing out the impossibility of the task:

"In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' (People v. Chambers, 231 Cal. App. 2d 23, 33.) It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A."

We are not here urging that all joint trials are improper, nor even that the trial judge abused his discretion in refusing the severance prior to the trial.[27] However, we are

[27] Despite this, it was clear even at that early date that the confessions implicated each of the other defendants, since they had

suggesting that the trial judge should have deleted the cross-incriminating references in each statement; failing that, as this Court has noted, the trial judge has a "continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer* v. *United States*, 362 U.S. 511, 516 (1960). It is submitted that at least by the close of the trial, when all of the statements had been read into the record without deletions, the trial judge had the duty of granting the severance.[25] Failure of the trial court to take either of these protective steps rises to constitutional dimensions.

Certainly, now that two of the confessions have been ruled constitutionally inadmissible, the prejudicial effect of the cross-incrimination contained therein is exacerbated. It is thus the duty of the appellate courts to grant the relief previously denied by the trial court.

In *Pointer* v. *Texas*, 380 U.S. 400 (1965) and *Douglas* v. *Alabama*, 380 U.S. 415 (1965), this Court held that the Sixth Amendment's guarantee of the right to confrontation forbids the use in state courts of transcript of a witness' testimony given at a preliminary hearing where that witness had moved and become unavailable and the confession of an accomplice who had been found guilty at a separate trial and invoked his privilege against self-incrimination at this defendant's trial. It is thus abundantly clear that if these petitioners had been granted separate trials,

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obtained copies through their interlocutory appeal. In *State* v. *Young*, *supra*, footnote 25, the Supreme Court of New Jersey sets forth a new procedure which appears to have been intended to obviate this problem in the future.

[25] At the close of the State's case each of defense counsel made a motion for judgment of acquittal, urging as grounds therefor the prejudicial effect of these confessions. [NJ/JA 606a-610a] Perhaps the remedy sought was too extreme; at any rate, it is suggested that at this point the trial judge should have granted the severance.

Godfrey's coerced statements, as well as the other cross-implicating statements, could not have been placed before the jury. To permit petitioners' constitutional rights to be undermined simply because it appeared to the trial court that it would be cheaper and easier for the state to try all of these defendants together, would be a shocking denial of justice.

V.

The Prosecutor's Inflammatory Summation So Grievously Misstated and Distorted the Facts, to the Serious Prejudice of the Defendants, That They Were Deprived of the Fair Trial Guaranteed by Due Process of Law.

The crucial issue at petitioners' joint trial, as handled by defense counsel, was whether the jury would bring in a verdict of death or life imprisonment. In that context, the prosecutor's summation was directed toward inducing the jury to vote a death verdict. His argument, both in style and content, so far over-reached permissible advocacy that it deprived petitioners of a fair trial as guaranteed by the Fourteenth Amendment.

The prosecutor carefully tried to create the false image in the minds of the jury that the defendants were professional criminals with extensive criminal records, who had lived profitable lives of crime and consistently followed standards of conduct abhorrent to the basic norms of decent society. In what he himself styled as the "parlance of the underworld" [T.R. 343], the prosecutor repeatedly used epithets implying petitioners' professional criminality and membership in that "underworld".

It is unnecessary to reproduce here all of the summation, in which the prosecutor repeatedly referred to the defen-

dants in various ways as "the slippery ring leader" [T.R. 343], the "finger man" or "the conniving finger man", [T.R. 242, 307] the "strongarm men" or the "strongarm guys" [T.R. 245, 307], and the "trigger man" [T.R. 243]. His favorite epithet was "hood" or "hoodlum" [T.R. 253, 311, 315, 317, 318.] Cassidy was referred to as "the lamb" [T.R. 307], or as "slick Cassidy". [T.R. 309] The weapons were described as "the arsenal" [T.R. 244, 309]. The climax of this litany of labels of professional criminality was the prosecutor's description of the defendants' appearance in the courtroom.

> "I did notice that each one of them changed a suit each day. Well, maybe they are fashion models, maybe they are the slick boys, big-time stuff, maybe they are; maybe they can dress in Ivy League suits, fancy shirts, high-priced ties, look the smart boy, visit the night clubs, drink, know the records, maybe they are. On whose money? On the Edward Davises' money ... Do you know why they can take this attitude? They can sit here because they have trained themselves to have an indifference to law and decency. They don't believe, they don't subscribe to our way of living, and if you ladies and gentlemen of the jury, if you decent, respectable people put your stamp of approval on it, if you condone these killings, if you condone these armed robberies to enable these boys to lead the slick lives that they do, if you condone it by recommending prison terms, may the Lord above help all of us." [T.R. 312-313]

Contrary to the prosecutor's inflammatory argument, there was nothing in the record to show that the defendants

were professional gangsters, living fashionably and in high style on the ill-gotten gains of robbery and murder. Cassidy had no criminal record of any kind, not even of arrest. Johnson and Godfrey each had one prior conviction. The image calculatingly drawn by the prosecutor bears no resemblance to the true situation."

In his recapitulation of the homicide for which defendants were being tried, the prosecutor argued, without any basis in the record, that the killing was pre-planned. [T.R. 244-245] Later, the prosecutor declared that the victim, Davis, frustrated their plans by not dropping dead immediately. [T.R. 249]

Defense counsel interrupted this virulent summation, but the trial court refused to intervene and permitted it to continue unabated. [T.R. 312]

The prejudicial and false implication of professional criminality of the prosecutor's summation was beyond the power of the defense to correct or overcome. Under the law prevailing at the time of petitioners' trial, evidence

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" The opinion of this Court in *Viereck* v. *United States*, 318 U.S. 236, 248 (1943), is particularly appropriate: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States*, 295 U.S. 78, 88. Compare *New York Central R. Co.* v. *Johnson*, 279 U.S. 310, 316-18." This is no less applicable to a state prosecuting attorney.

germane only to the question of sentence was inadmissible. The defendants were powerless to convey to the jury, in any proper fashion, that they were not the slick professionals of the prosecutor's invention. Although the State Supreme Court has subsequently modified the rigor of its rule so as to permit evidence in mitigation or extenuation of punishment to be introduced in a capital case, *State* v. *Mount*, 30 N.J. 195, 152 A.2d 343 (1960), that Court has refused to make that change applicable to petitioners' case, which was tried before the *Mount* decision. See note 15, *supra*.

The New Jersey statute investing the jury in a first degree murder case with the responsibility to choose between a sentence of death and life imprisonment gives the jury no standards whatsoever to guide them, but does provide that the decision shall be made upon "the evidence." *N.J. Stat. Ann.* 2A:113-4. The prosecutor's pejorative summation was calculated to induce the jury to decide upon "facts" not in the evidence. The result effectively deprived petitioners of their right to a fair trial, guaranteed by the Due Process Clause of the Constitution.[30]

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[30] The Court below refused to treat the merits of this argument, on the ground that it had considered the summation on direct appeal from the conviction. [T.R. 364] The Court overlooked completely that the issue had not previously been raised in terms of the Constitution. Further, the prior determination rested substantially upon the failure of defense counsel to be more vigorous in their objections. This failure of counsel should not preclude a determination of the constitutional question on the merits. *Fay* v. *Noia*, 372 U.S. 391 (1963); *Henry* v. *Mississippi*, 379 U.S. 443 (1965).

VI.

The Prosecutor, Acting to Induce the Jury to Sentence Petitioners to Death, Argued Extensively That Petitioners Should Be Executed in Order to Deter Others From Engaging in Crime, an Unfounded Theory Not Based on Any Evidence, Tending Thereby to Deprive Petitioners of Their Lives Without Due Process of Law.

As a matter of fundamental fairness and observance of sound legal principle, the wholly unfounded theory that the death penalty deters crime should not be urged upon a jury charged with the responsibility of choosing between a death sentence or life imprisonment. Neither in the charge to the jury nor in summation by counsel should the unproved belief that the death penalty has a special deterrent effect be permitted. In petitioners' trial, the prosecutor argued extensively that it was urgent for the jury to bring in a death verdict, rather than life imprisonment, because of the need for deterrence of others. Such argument deprived petitioners of due process of law.

The prosecutor openly declared that the theory of the death penalty was deterrence.

> "Ladies and gentlemen, punishment for crime is not all together retribution. The State does not say, because one life was taken, therefore another life must be taken. No, we don't come in on that basis. There are two reasons for punishment. You may have heard this time and time again, but let us get it clear here, because you are now concerned with it. There are two reasons for punishment, the first, punishment to the offender of the law and the second, a deterrent against others from breaking the law. This is your opportu-

nity, ladies and gentlemen, to flash a warning light to all of the hoodlums in and about Camden County and the State of New Jersey and to anyone else who dares to repeat this similar offense, that we will not tolerate it. We do not like this kind of business in our community or anywhere else. This is your opportunity, ladies and gentlemen, to shout out in a call that will be heard unmistakeably all around that death awaits the criminal who kills in the course of crime. This is your opportunity, ladies and gentlemen, to say that we decent people stand for law and order. Is this important? Edward Davis had a right to earn a livelihood in his toy store. Would anyone deny him that right? He had a right to expect that he would never be molested by anyone. He had a right to live and I respectfully urge you that this is your opportunity to announce by your verdict that the remaining Edward Davises in Camden County can continue to expect those rights . . . "[21] [T.R. 316-317]

More colorful than the prosecutor's lecture to the jury on his theories of penology were his allusions to the imagined effect on society if the death penalty were not imposed on petitioners.

"We will be returning the law of the jungle, talking about the law that they want, we shall be returning the law that the man who is the quickest on the draw, he will be the kingpin. I suppose the man who has the

[21] "Why should you compromise yourselves, the whole community's future and welfare for these three despicable criminals? Tell them and through them to everyone else who even has an idea to venture in this criminal business that crime does not pay." [T.R. 318]

most notches in his gun, he will be the fellow who will be respected in the neighborhood." [T.R. 313]

As is well known, there is no scientific evidence proving that the death penalty has any special deterrent effect. Most scholars who have compared jurisdictions with and without the death penalty have concluded that no perceptible deterrence is attributable to that penalty. See, e.g., *Bedau, The Death Penalty in America, Anthology, 1964,* especially *Chapter 6* thereof; *Thorsten Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute. XII, The American Law Institute, 1959; Capital Punishment, Staff Research Report No. 46, Ohio Legislative Service Commission, January 1961; Royal Commission on Capital Punishment, 1949-1953, Report, Her Majesty's Stationery Office, 1953; The Commonwealth of Massachusetts, Report and Recommendations of the Special Commission Established for the Purpose of Investigating and Studying the Abolition of the Death Penalty in Capital Cases, 1959; General Assembly of Pennsylvania, Report of the Joint Legislative Committee on Capital Punishment, June 1961.* For the prosecutor to tell the jury that the death penalty is justified as a deterrence of others, a deterrence not found in sentences of life imprisonment, was to mislead the jury on an issue that was critical to the verdict.

The California Supreme Court has firmly rejected the practice of prosecutors urging juries to return death verdicts on the basis of supposed deterrence. In the leading case, decided *en banc* in 1961, that Court declared:

"... it is not a matter of common knowledge, that capital punishment is or is not a more effective deterrent

than imprisonment. Since evidence on the question is inadmissible, argument thereon by prosecution or defense could serve no useful purpose, is apt to be misleading, and is therefore improper." *People* v. *Love*, 56 Cal.2d 720, 731, 366 P.2d 33, 39 (1961).

The California Supreme Court reaffirmed its conclusion and made the prohibition absolute two years later. *People* v. *Ketchel*, 59 Cal.2d 503, 381 P.2d 394 (1963).

This Court had made clear its position of the constitutional requirement that a jury's verdict must arise from the evidence presented at trial.

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner* v. *Louisiana*, 379 U.S. 466, 472-473 (1965).

New Jersey law also unequivocally requires that juries in capital cases, when fixing punishment, shall decide upon all the "evidence." *N.J. Stat. Ann.* 2A:113-4.

The prosecutor's argument in this case raised a factual question on which there was no evidence whatsoever. He implicitly asked, indeed he begged, for a verdict based on his supposed superior knowledge of crime and his official State position. Even if we consider him as testifying to his knowledge of the deterrent effect of the death penalty, the defendants were deprived of any chance to challenge his credentials as an expert or to cross-examine him. See *Pointer* v. *Texas*, 380 U.S. 400 (1965).

The undoubted prejudice to the defendants from the improper summation violates petitioners' constitutional rights, under the Fifth and Fourteenth Amendments, that their lives not become forfeited without a trial and verdict that meet the standards of due process of law.[32]

VII.

Statements Elicited From a Suspect in a State Criminal Proceeding During a Substantial Period of Unconstitutional Police Detention, Such That the Statements Are the Product of the Unlawful Detention, May Not Be Introduced by the Prosecution in a Later Trial of That Suspect.

The most celebrated writ in the history of Anglo-American law, the Great Writ of Freedom, *habeas corpus*, was designed to protect the liberty of the private citizen against arbitrary and illegal detention without due process of law. "In countries where the English common law prevails, and to some extent in other lands, it is the chief method of securing a peremptory determination whether a person is lawfully detained in custody, and if not, of providing for his immediate liberation. . . . [I]n the Stuart period, during the struggle to limit the royal prerogative, John Selden and other counsel sought to employ the writ as a method of restoring the liberty of a man imprisoned by the executive without showing the cause of the commitment. This . . . use of the writ, denied at first by the judges in *Darnel's Case*, 3 S.T. 1 (1627), was declared valid by the Petition of Right." Wyzanski, *The Writ of Habeas Corpus*, 243 THE ANNALS 101 (1946).

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[32] The New Jersey Supreme Court did not explicitly discuss this ground for relief. Since it had never been presented before the present post-conviction relief proceeding, it may be assumed that the court below implicitly rejected the argument on the merits.

The guarantee that no person shall be deprived of liberty or imprisoned by the executive without a showing of cause for the commitment is written into the Constitution in the Fifth and Fourteenth Amendments. Detention of individuals by the police, at their will and whim, is plainly anathema to one of our most cherished principles.

In the case of petitioner Cassidy, there was an incontrovertibly unconstitutional deprivation of liberty without due process of law. Arrested in the pre-dawn hours of January 29, 1958, he was held *incommunicado* at the complete mercy of the police and prosecuting authorities of Camden until, more than two days later, he was first taken before a judicial officer and afforded a court hearing on the propriety of his commitment.

No one could properly describe such detention as lawful. The clearest indication of the lawlessness of what occurred is seen in the inevitable result of a petition for writ of *habeas corpus* that hypothetically might have been filed on behalf of Cassidy prior to January 31. Against a rule to show cause why Cassidy should not be discharged from custody, the State would have had no response. Under our Constitution, under one of our most fundamental principles, the police have no right to hold any man who seeks *habeas corpus* relief if a judicial order has not been made for his commitment. No State can answer a *habeas corpus* court with the response that the police and the prosecutor think they have the right to deprive a man of liberty.

Of course, Cassidy did not in fact petition for a writ of *habeas corpus*. His jailers were determined that he see no judicial officer until they had extracted from him confessions that they believed would assure his conviction of murder in the first degree. Despite an unequivocal New Jersey

Rule, N.J.R.R. 3:2-3(a), requiring the police to take persons they arrest before a magistrate without unnecessary delay, Cassidy's inquisitors wanted no judicial interference with their quest to wring a life-forfeiting confession out of him. Therefore, Cassidy himself was powerless to petition for the Great Writ of Freedom.[33] Nor was he able to communicate with anyone else who conceivably might have acted on his behalf. The police were not forced in fact to answer to a court their lawlessness. But it is beyond argument that their acts were utterly without process of law.

As a result of the prolonged, unlawful, secret detention, the police and prosecuting authorities elicited from Cassidy three formally recorded statements that were used in his trial to condemn him to death. Those statements were unquestionably the product of the unconstitutional deprivation of liberty. As such, those statements should not have been permitted to be introduced as evidence. See *Watts* v. *Indiana*, 338 U.S. 49, 56, 57 (1949) (concurring opinion of Mr. Justice Douglas).

The products in the form of tangible evidence derived from an unreasonable search and seizure must, under the Constitution, be excluded from evidence. *Weeks* v. *United States*, 232 U.S. 383 (1914); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Not only tangible evidence, but statements made by a defendant in his own home at the time of an unlawful arrest are the fruits of the unlawful action and must be excluded from evidence.[34] *Wong Sun* v. *United States*, 371

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[33] Doubtless he was ignorant of his right to due process of law, but his jailers did not advise him that he was entitled to petition for *habeas corpus*.

[34] See also *People* v. *Schaumloffel*, 53 Cal. 2d 96, 346 P.2d 393 (1959); *People* v. *Mills*, 148 Cal. App. 2d 392, 306 P.2d 1005 (1957); *People* v. *Albea*, 2 Ill. 2d 317, 118 N.E.2d 277 (1954);

U.S. 471 (1963).[35] *A fortiori* statements wrung from a criminal suspect held unconstitutionally for a prolonged period must be excluded from evidence.

The basis for exclusion of tangible evidence that is the fruit of an unreasonable search and seizure does not touch the probative reliability of the evidence. See *Linkletter* v. *Walker*, 381 U.S. 618 (1965). However, statements that are elicited during a lengthy period of secret detention and intensive interrogation inevitably raise doubts as to their reliability. And, indeed, Cassidy asserts that those statements extracted from him are bent by the pressure of police interrogation to admit a planned robbery that did not exist. In light of the substantial possibility that statements taken under these circumstances are not fully credible, no problem of retroactivity of the exclusionary principle is present. See Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 84-86 (1965).[36]

People v. *Martin*, 383 Ill. 192, 46 N.E.2d 997 (1943). In each of these cases the identity of potential prosecution witnesses was ascertained through an unlawful search, and the witnesses were not allowed to testify at the subsequent trial.

[35] That this decision rests on a constitutional footing is revealed by *Traub* v. *Connecticut*, 374 U.S. 493 (1963), which reversed a State decision *per curiam* on the basis of *Wong Sun*.

[36] Professor Mishkin's analysis is directed not to the issue of retroactivity of new developments in constitutional law, which he believes should always be deemed fully retroactive, but rather to the scope of federal *habeas corpus* relief as a form of collateral attack on judgments that have become final. The present case arises under a state post-conviction remedy. Under Professor Mishkin's analysis, since the New Jersey Supreme Court purported to treat this contention on the merits, rather than on the scope of the State remedy, this Court should likewise reach the merits without regard to concerns of retroactivity. See Mishkin, *Foreword*, 79 HARV. L. REV. 56, 91 n.132 (1965).

The New Jersey Supreme Court failed to recognize the force of petitioner's argument because it mis-characterized the argument as deriving from the New Jersey rule requiring that persons who have been arrested be taken before a magistrate without unnecessary delay. N.J.R.R. 3:2-3(a). [T.R. 361] That court inferred, incorrectly, that petitioner was making an argument under State law analogous to the exclusionary rule this Court has laid down with respect to Rule 5 of the Federal Rules of Criminal Procedure. *Mallory* v. *United States,* 354 U.S. 449 (1957); *McNabb* v. *United States,* 318 U.S. 332 (1943). This is a misconception of the contention advanced. Petitioner's argument is based entirely on the Constitution and has nothing to do with N.J.R.R. 3:2-3(a).[37] Cassidy's detention was not unconstitutional because New Jersey has adopted a rule of court requiring the production of arrested persons before magistrates. If the New Jersey court were to repeal N.J.R.R. 3:2-3(a) formally, as it has done already in effect by giving the rule no force whatsoever, deprivation of liberty at the will and whim of the police would still be unconstitutional.

The prolonged detention of Cassidy by the police without a judicial commitment was a violation of the Fifth and Fourteenth Amendments of the Constitution. His three formally recorded statements were a product of that illegal detention. The introduction of those statements into evidence on behalf of the prosecution vitiates his conviction, and he is entitled to relief.

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[37] Likewise, petitioner's contention is not based upon this Court's decisions in *Mallory* v. *United States, supra* and *McNabb* v. *United States, supra,* which explicitly rest on this Court's supervisory power over federal courts, a power inapplicable to the States.

CONCLUSION

For all of the reasons set out above, it is respectfully submitted that the judgment of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

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No. 762

Vide Nos. 584,759,760 for Brief of National District Attorneys Association.

Vide Nos. 584,759,760,761 for Brief of American Civil Liberties Union

Vide Nos. 584,759,760,761 for Brief of State of New York joined by other States